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Hugh Evander Willis
Indiana University School of Law

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CONSIDERATION IN THE ANGLO-AMERICAN LAW OF CONTRACTS

(A Historical Summary)
(Concluded)

HUGH EVANDER WILLIS

Any Act or Promise

Other authorities, however, hold that detriment to the promisee does not have to consist of legal detriment, but that any act or promise given for a promise is sufficient detriment to answer the requirements of consideration. A promise by an infant to marry an adult is held to be sufficient consideration for the adult's promise,[88] though the contract is voidable by the infant. The infant has promised to perform, it is said, if he chooses. The giving up, or the promise to give up, the privilege of single blessedness would be legal detriment, and therefore the adult's promise would be consideration for the infant's in the sense of legal detriment, but it is hard to see how there can be legal detriment in the sense that a person has promised to surrender a legal privilege when he has promised to do so if he chooses, or unless he chooses not to do so (if such is the case). Hence it is said the only detriment to the promisee in such cases is the making of the promise. The same thing is true of all voidable promises,[89] and probably of conditional promises.[90] Yet in such cases we have true contracts, and that means con-

[88] *Holt v. Ward Clarencieux*, 2 Strange 937.

[89] *Atwell v. Jenkins*, 163 Mass. 362; Williston, Contracts, Sec. 105.

[90] *McMullan v. Dickinson Co.*, 66 Minn. 405; *Coleman v. Eyre*, 45 N. Y. 38.

sideration. One party simply has a defense of which he may avail himself if the other tries to hold him to the contract. Therefore the theory of consideration adopted in such cases it is thought must be that any act or promise is sufficient detriment to the promisee to constitute consideration. In compromise cases, also, unless the privilege of suit is surrendered, it is impossible to see how one person has in unilateral cases surrendered anything more than an act, and in bilateral cases promised anything but a promise.[91] But it is contended the best illustrations of the repudiation of the theory that detriment to the promisee, or the promise thereof, must be any act or promise with reference to which a person has legal capacity, and of the adoption of the theory that it may consist merely of any act or promise, are found in the cases of the performance, or the promise to perform, a pre-existing legal duty. If the act or the promise is given to the person to whom the promisor is already under existing duty, there is neither legal detriment to the promisee nor legal benefit to the promisor. If the act or promise is given to a third person, it is hard to see how there is legal detriment, though it has been argued that there is legal benefit. For this reason the English cases of type one and most of the United States cases of both types hold that there is no consideration.[92] However, the English cases of type two and some United States cases of both types hold that there is consideration in such cases,[93] and the theory of these cases must be discovered. The courts in both types of cases apparently

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[91] *Cook v. Songat*, 1 Leon. 103, 4 Leon. 31; *Seward & Scales v. Mitchell*, 1 Cold. 87; *Nassoiy v. Tomlinson*, 148 N. Y. 326; *Sweitzer v. Heasley*, 13 Ind. App. 567.

[92] *Foakes v. Beer*, L. R. 9 App. Cas. 605; *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *McDevitt v. Stokes*, 174 Ky. 515; *Davis v. Morgan*, 117 Ga. 504; *Harris v. Cassady*, 107 Ind. 158; *Mader v. Cool*, 14 Ind. App. 299; *Reynolds v. Nugent*, 25 Ind. 328; Williston, Contracts, Sec. 130, and the rule has been extended to cases of discharge of contracts. *Foakes v. Beer, supra.*

[93] *Sherwood v. Woodward*, Cro. Eliz. 700; *Shadwell v. Shadwell*, 30 L. J. C. P. 145; *Scotson v. Pegg*, 6 Hurl. & N. 295; *Lattimore v. Harsen*, 14 John. 330; *Monroe v. Perkins*, 9 Pick. 298; *Abbott v. Doane*, 163 Mass. 433; *DeCicco v. Schweizer et al.*, 221 N. Y. 431; *Schwartzreich v. Bauman-Basch, Inc.*, 103 Misc. Rep. 214.

The writer cannot agree with Mr. Williston that these cases were decided on the ground of benefit to the promisor. In them there was some talk of benefit, but the judges tried harder to find detriment than to find benefit; and the writer at least cannot understand why anyone should

proceed on the theory of detriment to the promisee rather than benefit to the promisor. Hence it is maintained that they adopt as their theory of consideration detriment to the promisee, or the promise thereof, in the sense of any act or promise. This is certainly true of the cases of type one,[94] where the second attempted contract is between the same parties, unless the power to

desire to introduce into the law of consideration another difficult theory when it already has too many, especially in view of the fact that it will explain only cases of type two and not those of type one, and in view of the fact that the law of *quasi* contracts is supposed to cover recovery for benefits conferred whenever in equity and good conscience the one benefited ought to pay therefor. *Edson v. Poppe,* 24 S. D. 466; *Sharp v. Hoopes,* 74 N. J. L. 191.

The explanation of some of the courts that the old contract is mutually rescinded and that then the parties enter into a new contract is not satisfactory, because in practically all cases it is contrary to the facts and a mere fiction. The courts have really adopted a new theory of consideration, and they would do better to say so than to pretend that the facts are what they are not in order to escape this contingency. *Lingenfelder v. Wainwright Brewing Co.,* 103 Mo. 578. The explanation of other courts that there is consideration, if a person encounters new and unforeseen difficulties and goes on or promises to go on and complete the work for a new promise of greater compensation, *Michaud v. MacGregor,* 61 Minn. 198; *Linz v. Schuck,* 106 Md. 220; *King v. Duluth, etc., R. Co.,* 61 Minn. 482, is also hard to understand; unless thereby they mean either (1) this new and unforeseen difficulty was not embraced within the original pre-existing duty, or (2) that it was an implied condition subsequent terminating the original contract, or (3) that it was ground for rescission in equity because of a mutual assumption as to a matter of performance. Equally fallacious is the explanation that a person has a right to sue for damages and that waiving this is sufficient consideration, *Evans v. Oregon, etc., Ry.,* 58 Wash. 429; *Pierce v. Walton,* 20 Ind. App. 66, for the other party must furnish consideration, and he has no right to pay damages; also the explanation that the power to break a contract is sufficient consideration, because such power causes no detriment to the promisee.

In the case of *DeCicco v. Schweizer, supra,* a third person (father of one of the other parties) promised two other parties (the daughter of the third and a young man), who were engaged to be married, that he would pay them $2,500 a year during the daughter's life time, for their marriage, but after about ten years refused to keep up the payments longer. He was sued and his defense was that there was no consideration for his promise, but Judge Cardozo found consideration for his promise in the giving up by the parties under contract to marry each other of their privilege of rescinding the contract. Judge Cardozo's explanation makes the consideration not "benefit to the promisor" nor "any act or promise," but a "legal right, power, privilege, or immunity;" but it is certainly rational.

[94] *Lattimore v. Harsen* and *Monroe v. Perkins, supra,* note 93.

break a contract is recognized as consideration; and it is true of the cases of type two where a third party is brought in unless the theory of benefit to the promisor or Judge Cardozo's rationalization is accepted to explain them.

The late Dean Ames championed the theory that detriment to the promisee did not have to be an act or promise with reference to which a person had legal capacity but that any act or promise was enough, and he maintained that such theory came nearest to reconciling the cases.[95] He defined consideration "as any act or forbearance" (unilateral), or promise (bilateral) "by one person given in exchange for a promise by another."[96]

If consideration was defined as Mr. Ames defined it, there would be found in the law of consideration nothing which is not already found in the law of agreement. In every unilateral agreement there would be an act, and in every bilateral agreement there would be a promise, given in exchange for a promise. Hence it would add nothing to require consideration, and it would not be necessary to give it separate study or discussion. The law of agreement, with its requirement of offer and acceptance, would cover everything.

What, then, is the meaning of "detriment to the promisee?" It is impossible to answer this question. If it means any act or promise with reference to which a person has legal capacity,

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95 "The examination of our three classes of cases, of which *Callisher v. Bischoffsheim, Shadwell v. Shadwell,* and *Foakes v. Beer,* are the conspicuous illustrations, makes it clear that the authorities cannot be reconciled with any theory of consideration. We must either adopt the view that consideration is any act or forbearance not already due from the promisee, and treat the first two classes of cases as exceptions, indefensible on principle, but established as law in England, and either already representing, or likely to represent, the predominant judicial opinion in this country, or else we must adopt the other view, that consideration is any act or forbearance by the promisee, and regard the third class of cases, of which *Foakes v. Beer* is the type, as an exception contrary to principle, but sanctioned by the highest judicial authority in England and the United States." Ames, *Lectures on Legal History,* 339.

The writer does not agree with Mr. Ames' interpretation of the case of *Callisher v. Bischoffsheim,* because he thinks in that case there was the surrender of a legal privilege, but he does agree with Mr. Ames' general point of view.

96 Ames, *Lectures on Legal History,* 323.

Many early cases make the statement that a promise for a promise is sufficient consideration. *Strangeborough and Warner's Case,* 4 Leon. 3; *Nichols v. Raynbred,* Hob. 88; *Goring v. Goring,* Yelv. 11; II Street, Found. Legal Lia., 107-111, 135.

that is any legal right, privilege, power, or immunity, the instances where any act or promise has been held sufficient consideration may have to be classed as exceptions. If it means any act or promise, then, according to the majority view, the cases of forbearance to sue on invalid claims and of performance of pre-existing legal duties will have to be classed as exceptions, and it will be a work of supererogation to talk about legal detriment, for "any act or promise" is the broader term and would include all cases of legal detriment. Of course any act or promise, which is also a legal right, or legal privilege, or legal power, or legal immunity, is always sufficient consideration; but perhaps it cannot be said that the act or promise must be one of these, for apparently in many cases it may be merely any act or promise. If we were sure that consideration in Anglo-American law had to be detriment to the promisee in one or the other of these senses, our problem would be simplified, but we have already learned that the notion of benefit to the promisor is one which cannot be entirely ignored, and we are going to learn that there are other notions of consideration which cannot be forgotten.[97]

Can it be said that detriment to the promisee, in either of the above senses, is required by Anglo-American law? Nobody knows. All that can be said is, that in one of these senses it is required and used more than anything else.

Bargain Theory

Whatever doubt there may be as to benefit to the promisor and detriment to the promisee as consideration, there is no doubt that so far as these forms of consideration are concerned, if they are to be sufficient consideration, they must be given in exchange for a promise. This evidently means that the common law theory of consideration is something more than the will theory of the Roman law and the evidence theory of Lord Mansfield, and yet it is not the equivalent theory, or the injurious reliance theory: it is the bargain theory.[98] It means that something

[97] It must be borne in mind, also, that the text-writers are not agreed that there is no distinction between unilateral agreements and bilateral agreements. Williston, Contracts, Secs. 103-103d, Sec. 131a; Street, Found. Legal Lia., 107-121; Corbin, in 27 Yale L. Jour. 374-381; Leake, Contracts (1st ed.), 314; (2d ed.), 612, 613.

[98] Pound, *Introduction to Philosophy of Law*, 269-276; *Pillans et al. v. Van Mierop et al.*, 3 Burr. 1663.

must be given as the price for a promise. Gratuitous promises will not be enforced. The consideration does not have to be adequate.[99] It does not have to be the inducing cause of the promise.[100] It is enough if it is given in exchange for, or as the price for, a promise.[101] Here again we have the same idea that we have in the law of agreement.[102]

From what source came the requirement of consideration now under discussion? It cannot be found in the tort action of special assumpsit before it became a contract action, for at that time the detriment to the promisee was not given in exchange for the promise but followed as a consequence of failure to perform the promise (injurious reliance). Mr. Salmond contends that the requirement that whatever is consideration must be given for a promise was imported from equity.[103] Mr. Justice Holmes contends that it was imported from debt, with its requirement of *quid pro quo*.[104] Both equity and debt had similar requirements in this respect. This notion, taken from one or both sources, was amalgamated with the idea of detriment to the promisee to give the dual modern requirement that the act or promise must be given in exchange for another promise.

For this reason love and affection of the promisor,[105] an offer of a gift with burdens,[106] performance of an act without a

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99 *Schnell v. Nell*, 17 Ind. 29.

100 Justice Holmes' statement to the contrary in *Wisconsin, etc., Co. v. Powers*, 191 U. S. 379, is not supported by the weight of authority. *Underwood Typewriter Co. v. Century Realty Co.*, 220 Mo. 522. Note also cases of unilateral contracts, where the promise may induce the act, but the act does not induce the promise.

101 *Brawn et al. v. Lyford*, 103 Me.. 362. Hence liability in gratuitous bailments should not be explained on contract ground but on the ground of an obligation imposed by law without contract. *Carr et al. v. Maine Cent. R. R.*, 78 N. H. 502; *Fooly and Preston's Case*, 1 Leon. 297; *Wheatley v. Low*, Cro. Jac. 668; *Coggs v. Bernard*, 2 Ld. Ray. 920, *contra.*

102 *Kirksey v. Kirksey*, 8 Ala. 131; *J. H. Queal & Co. v. Peterson*, 138 Iowa 514; *Schroyer v. Thompson*, 262 Pa. 282. *Cf. Thomas v. Thomas*, 2 Q. B. 851, and *Brackenbury et al. v. Hodgkin et al.*, 116 Me. 399; *Williams v. Carwardine*, 4 Barn. & Adol. 621; *Dawkins v. Sappington*, 26 Ind. 199, *contra.*

103 Salmond, *History of Contracts, 3 Select Anglo-American Essays*, 325-329, 336, 337.

104 Holmes, Common Law, 286.

105 *Schnell v. Nell*, 17 Ind. 29; *Denman v. McMahin*, 37 Ind. 241.

106 *Kirksey v. Kirksey*, 8 Ala. 131. See note 102.

knowledge of or an intent to accept an offer of reward for that act, and a promise for a past consideration,[107] are all cases where it has been held that there was no consideration, because in such cases the promisee gives nothing in exchange for, or to buy, the promise. Charitable subscription and other gift cases and moral consideration cases are also cases where nothing is given in exchange for the promise, and if the courts were consistent, they would hold that there is no consideration, but since they have not been consistent these cases will have to be explained on some other ground. But if it is found that some act (either a mere act, or a right, power, privilege, or immunity) or the promise thereof was given in exchange for a promise, the courts will find consideration.[108] Can it be said, then, that it is Anglo-American law that something must always be given for a promise? No one knows, for there are other forms of consideration which are sometimes sufficient where this is not true.

Equivalent Theory

In Anglo-American law, the Equivalent Theory has been adopted only in the case of exchanges of money.[109] The American Law Institute makes this theory apply also in the case of the exchange of fungible goods for goods of the same kind and quality. However the Equivalent Theory is really the Bargain Theory raised to the n^{th} power, and therefore, need not be treated further as exceptional.

Injurious Reliance Theory

Historically, the theory of injurious reliance, as consideration, has very good support. It was the basis of recovery in the

[107] *Roscorla v. Thomas*, 3 Q. B. 234; *Moore v. Elmer*, 180 Mass 15; *Mills v. Wyman*, 3 Pick. 207; *Boston v. Dodge*, 1 Blackf. 23; *Clodfelter v. Hulett*, 72 Ind. 137. It should be noted that the requirement under discussion applies only in that part of the law which has grown up out of the action of special assumpsit. It has no application in that part of the law which has grown up out of the action of general assumpsit, except as it has anomalously been extended to inferred contracts. Precedent debt was the early requirement in general assumpsit cases, and a *quasi* contract is the modern requirement. *Janson v. Colomore*, 1 Rolle 396; *Slade's Case*, 4 Coke 92b; *Sidenham and Worlington's Case*, 2 Leon. 224; *Rann v. Hughes*, 7 T. R. 350.

[108] *Thomas v. Thomas*, 2 Q. B. 851; *Alliance Bank v. Broom*, 2 Drew. & S. 289.

[109] *Schnell v. Nell*, 17 Indiana 29.

action of special assumpsit when that action was regarded as a tort action and before it became a contract action. Of course, the bargain theory has nearly supplanted the injurious reliance theory, but there are certain places in our law where the injurious reliance theory still survives, although today the theory goes under the name of promissory estoppel. Modern cases of promissory estoppel are therefore merely survivals of this old notion. In Anglo-American law this injurious reliance theory has been adopted and followed in the following cases: (1) Gratuitous promises to convey land where the promisee has entered upon the land and made improvements;[110] (2) gratuitous promises of a license acted upon so that the licensee has seriously changed his position;[111] (3) charitable subscriptions where acts have been done in justifiable reliance thereon;[112] (4) gratuitous promises of other gifts reasonably relied and acted upon to one's injury;[113] (5) gratuitous undertakings of bailees reasonably relied upon;[114] and (6) promises of waiver justifiably relied upon.[115] None of these cases can in any way be assimilated under the bargain theory. Practically all unilateral agreements can also be explained on the injurious reliance theory, but since they can also be explained on the bargain theory, it is not customary to use the injurious reliance explanation.

Moral Consideration

We have already seen how Lord Mansfield introduced moral consideration into Anglo-American law, in lieu of the consideration of precedent debt in general assumpsit cases.[116] It is true that the judges following Lord Mansfield refused to extend the doctrine of moral consideration to any new cases,[117] and later judges explained the earlier cases on the ground of waiver; but

110 Ames' Cases on Equity, 306-9; *Law v. Henry,* 39 Ind. 414; *Horner v. Clark,* 27 Ind. App. 6.

111 *Bassett Manufacturing Co. v. Riley* (1925), 9 Fed. (2nd) 138.

112 *Presbyterian Church v. Cooper* (1889), 112 N. Y. 517; *Y. M. C. A. v. Estill* (1913), 140 Ga. 29; *Northwestern Conf., etc., v. Myers,* 36 Ind. 375.

113 *Wilson v. Spray* (1920), 145 Ark. 21; *Devecmon v. Shaw* (1888), 69 Md. 199.

114 *Siegel v. Spear* (1920), 234 N. Y. 479.

115 *Underwood Typewriter Co. v. Century Realty Co.* (1909), 220 Mo. 522; *Butt v. Butt et al.,* 91 Ind. 305.

116 See "General Assumpsit," *supra.*

117 *Binnington v. Wallace,* 4 Barn. & Ald. 650; *Littlefield v. Shee,* 2 Barn. & Ald. 811; *Eastwood v. Kenyon,* 11 Adol. & El. 438.

since the waiver theory is proving untenable, the judges are having to go back to the ground upon which Lord Mansfield based his decisions. Lord Mansfield would like to have introduced new doctrines of consideration into all of the law of contracts,[118] but his immediate successors were not possessed with his ambition, so that at last the doctrine of moral consideration became practically obsolete, except as it survived in a few states of the Union and except as it still obtained in precedent debt cases.[119] But within the last few years there seems to have been a recrudescence of the theory of moral consideration.

In the case of *Bagaeff v. Prokapek*,[120] a note was given for a commission which the defendant had orally promised to pay the plaintiff for the sale of land, and the court held the note enforceable because it was supported by moral consideration. The oral promise was void under the statute of frauds, and therefore was never a legal obligation, but the court held that moral obligation was sufficient to support the promise in spite of that fact.

In the case of *Muir v. Kane, et ux.*,[121] the facts were almost identical with those in the above case except that the defendant did not make his promise directly to the plaintiff, and the court permitted recovery on the ground of moral obligation. On the "distinction between contracts formerly good, but on which the right of recovery has been barred by the statute, and those contracts which are barred in the first instance because of some legal defect in their execution . . . it has seemed to us the distinction is not sound. The moral obligation to pay for services rendered as a broker in selling real estate under an oral contract where the statute requires such contract to be in writing is just as binding as is the moral obligation to pay a debt that has become barred by the statute of limitations. . . . The validity of a promise to pay a debt barred by the statute of limitations is not founded on its antecedent legal obligation. There is no legal obligation to pay such a debt; if there were, there would be no need for a new promise. The obligation is moral solely, and, since there can be no difference in character between one moral obligation and another, there can be no rea-

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[118] *Pillans & Rose v. Van Mierop & Hopkins*, 3 Burr. 1663.

[119] Williston, Contracts, Secs. 149-204. See notes 28 and 30, *supra*.

[120] 212 Mich. 265.

[121] 55 Wash. 131. See also, *Straus v. Cunningham*, 159 App. Div. (N. Y.) 718; *Bentley v. Morse*, 14 John. 468, cases cited in notes 28 and 30, and *Pierce v. Walton*, 20 Ind. App. 66.

son for holding that one moral obligation will support a promise while another will not."

Hence it can no longer be said that moral consideration is not sufficient for a promise, either where there was a prior legal obligation, or where there was none. If moral consideration is sufficient for some promises of each class, why not for all promises? Moral consideration has none of the characteristics of the common law consideration of detriment to the promisee, or even of benefit to the promisor, given for a promise, and if it should receive general adoption the others would have to be rejected. Whether, if moral consideration was adopted, it would remain permanently is doubtful. In *Eastwood v. Kenyon*,[122] it was said that it "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it." Perhaps this is so. At any rate, whatever is or is going to be the status of moral consideration, we already have a number of decisions which have enforced promises simply as such without any requirement of consideration. If moral consideration were not to have this result and be thus defined, how should it be defined? It is doubtful if an answer could be given to this question. What then is the status of moral consideration in Anglo-American law? Nobody knows.

Every Promise Intended to be Binding (Will Theory)

There are many cases where promises have been enforced simply as promises without any consideration whatever and without any agreement. Most of these have been promises in writing, but some have been oral promises. In the case of *Pillans, et al. v. Van Mierop, et al.*,[123] Lord Mansfield asked "if any case could be found where the undertaking holden to be *nudum pactum* was in writing," and the court in that case upheld such a promise. Other illustrations of cases where promises are enforced simply because they were intended to be binding though without consideration are found in gratuitous declarations of trust,[124] in accommodation indorsers of bills and notes,[124a] in cases of stipulations of parties and their counsel, in

[122] 11 Adol. & El. 438.

[123] 3 Burr. 1663.

[124] Perry, Trusts, 96; 39 Cyc. 57.

[124a] Uniform Negotiable Instruments Act, Sec. 29.

the case of the enforcement of promises at the suit of third-party beneficiaries;[125] and, of course, where the seal has not been abolished, promises under seal are enforced though without consideration, although the judges sometimes try to bring the specialty contract within the doctrine of consideration by declaring that the seal raises a presumption of consideration.[126] Recent cases show a still greater tendency to abrogate the requirement of consideration and to return to the position of Lord Mansfield.[127]

In the case of *McCrillis v. Sutton, et al.*,[128] where a husband and wife supposed they had legally adopted a young man when he was a child but they had not, the court granted specific performance of a written promise of the former that the latter "should have on the death of the husband (and of the wife) the same right to their property as if he had been adopted." The only consideration, if any, in this case was love and affection and past consideration. There was no present benefit to the

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125 Williston, Contracts, Secs. 356, 357, 361, 368, 381.

126 II Street, Found. Leg. Lia., 8-19.

127 Dean Pound has an interesting summary of this branch of the law: "On the other hand the extent to which courts today are straining to get away from the bargain theory and enforce promises which are not bargains and cannot be stated as such is significant. Subscription contracts, gratuitous promises afterwards acted on, promises based on moral obligations, new promises where a debt has been barred by limitation or bankruptcy or the like, the torturing of gifts into contracts by equity so as to enforce *pacta donationis* specifically in spite of the rule that equity will not aid a volunteer, the enforcement of gratuitous declarations of trust, specific enforcement of options under seal without consideration, specific performance by way of reformation in case of security to a creditor or settlement on a wife or provision for a child, voluntary relinquishment of a defense by a surety and other cases of 'waiver,' release by mere acknowledgment in some states, enforcement of gifts by way of reformation against the heir of a donor, 'mandates' where there is no *res*, and stipulations of parties and their counsel as to the conduct of and proceedings in litigation—all these make up a formidable catalogue of exceptional or anomalous cases with which the advocate of the bargain theory must struggle. When one adds the enforcement of promises at suit of third party beneficiaries, which is making headway the world over, and enforcement of promises where the consideration moves from a third person, which has strong advocates in America and is likely to be used to meet the exigencies of doing business through letters of credit, one can but see that Lord Mansfield's proposition that no promise made as a business transaction can be *nudum pactum* is nearer realization than we had supposed." *An Introduction to the Philosophy of Law*, 272-3.

128 207 Mich. 58.

promisor, no detriment to the promisee (either in the sense of legal detriment or in the sense of any act or promise), no moral obligation which was once a legal obligation. There was not even an agreement, and probably no moral obligation. There was simply a promise in writing. Hence the case is authority that neither consideration nor agreement is necessary but that a mere promise intended to be binding is enforceable, at least if in writing.[129]

Is it now Anglo-American law that a promise is enforceable without consideration? Once more, the answer must be: Nobody knows.

III

CONCLUSION

What is consideration in the Anglo-American law of contracts? No one knows. In the first place, in view of the many decisions which have enforced and are enforcing promises without consideration, no one can be sure that any form of consideration is required by our law. In the second place, even if some form of consideration is required, no one can say what it is. Is it precedent debt? Is it moral obligation? Is it the Roman law *causa* as developed by equity? Is it *quid pro quo?* Is it benefit to the promisor? Is it detriment to the promisee? Is it the equivalent theory, or the will theory, or the evidence theory, or the injurious reliance theory, or the bargain theory? Apparently it may be any one of these. This is probably why a prominent text writer has ambiguously defined consideration in a unilateral contract as "a detriment incurred by the promisee or a benefit received by the promisor at the request of the promisee;" and in a bilateral contract as "mutual promises in each of which the promisor undertakes some act of forbearance that will be, or apparently may be, detrimental to the promisee

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[129] Other cases in accord are *Sutch's Estate,* 201 Pa. 305; *Brickell v. Hendricks,* 121 Miss. 356; *Thomason et al. v. Bischer et al.,* 176 N. C. 622. There is a tendency on the part of law as well as equity to enforce deliberate promises simply as promises under one pretext or another.

India and at least ten of our states no longer require consideration for the discharge of a contract. Wald's Pollock, *Contracts* (3d ed.) 211; Ames, *Lectures on Legal History,* 329-340. Many of our states also no longer require consideration for the transfer of property. In some states a promise in writing is given the same effect as a promise under seal. Comp. Laws N. D. 1913, secs. 5828, 5833, 5849, 5881.

or beneficial to the promisor."[130] But no one would dare say that any one of these would under all circumstances be a sufficient consideration for a promise. One would doubtless be safest in tying up to the theory of detriment to the promisee. The safest generalization is that Anglo-American law has adopted the bargain theory; that the bargain theory requires detriment to the promisee; and that detriment to the promisee (if voidable and conditional contracts are rationalized as instances where each party has given up or promised to give up a legal right, power, privilege or immunity as in other contracts, but where one of the parties has a legal power to unmake the contract), must consist of some legal right, power, privilege or immunity. Consideration then, could, with the exception of moral consideration and injurious reliance, be defined as a legal right, power, privilege or immunity, causing legal detriment to the promisee, bargained for and given in exchange for a promise. Certainly a contract drawn according to this theory of consideration would be a well-drawn contract. Yet, it would be error to say that a contract must have this consideration. There are too many cases where moral consideration and injurious reliance theory have been held to be sufficient consideration and where deliberate promises have been held binding without consideration for such a statement to be accurate. Even the theory of consideration embodied in this definition is a tort notion whipped into place and made to do duty as consideration in contracts after it was covered with all the technicality known to the common law. It is unlike every other kind of consideration known to man. Its existence is accidental and due wholly to the fact that assumpsit was a more popular action than the other contract actions because tried before a jury, and gradually supplanted them. Had debt been adapted to the enforcement of promises and tried by jury our consideration today might be *quid pro quo*. Had equity retained its jurisdiction over contracts our consideration might be some sort of *causa*. Had covenant been able to withstand assumpsit, we should probably have no requirement of consideration at all. In spite of the fact that the definition is simple and seems to be clear, it is difficult to apply. Detriment to the promisee in the sense named means one thing in one jurisdiction at one time and another thing in another jurisdiction at the same time, or in the same jurisdiction at another time. In applying

[130] Williston, Contracts, secs. 102, 103f.

it the courts have resorted to over-fine explanations and hair-splitting distinctions, and often have reached unreasonable and irreconcilable conclusions. Insignificant and absurd things have been held to be sufficient detriment to the promisee. As a result, the law of consideration has become largely form and technicality, and it is reasonable to maintain that the tort idea of detriment to the promisee has become as great a load for assumpsit as *quid pro quo* was for debt and seal for covenant, and the action of assumpsit has placed the modern law of contracts into as bad a straight-jacket as the actions of covenant and debt placed the ancient law.[131]

What should be done about this situation? If the law is to be simplified and clarified either some one theory of consideration will have to be adopted by Anglo-American law or some combined theory more explicit and workable than any of the present combination of theories.

If some one theory were to be adopted, the choice would lie between two or three. *Quid pro quo* would not be chosen. It has already proven itself inadequate because not adapted for the enforcement of promises as such. Precedent debt, which was a fictional consideration at one time but now obsolete, offers no real possibilities. Benefit to the promisor adds nothing to and has no advantages over detriment to the promisee and bulks so large as a doctrine in *quasi* contracts that it would be unwise to introduce it into the law of contracts as consideration. The Roman *causa* offers no possibilities, because "there is no definable doctrine of *causa*."[132] " The Romans had no theory of *causa,* nor did they consider it an essential condition for the validity of contracts, but they have often applied the principles of *causa*."[133] The Roman law and probably the modern civil law are authority for no consideration more than for a par-

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131 "It is significant that although we have been theorizing about consideration for four centuries, our texts have not agreed upon a formula of consideration, much less our courts upon any consistent scheme of what is consideration and what is not. It means one thing—we are not exactly agreed what—in the law of simple contracts, another in the law of negotiable instruments, another in conveyancing under the Statute of Uses and still another thing—no one knows exactly what—in many cases in equity." Pound, *An Introduction to the Philosophy of Law,* 276-7.

132 Lorenzen, *Causa and Consideration,* 28 Yale L. Jour. 646; Buckland, *A Textbook of Roman Law,* 425.

133 Bry, *Principles de droit romain* (5th ed.), 502.

ticular theory of *causa*.[134] Moral consideration would be so likely to evolve into a requirement of no consideration that it does not demand separate discussion. While injurious reliance has been growing in scope in the last few years, it has not as yet become a large enough theory so that it can bid for exclusive adoption. This leaves for our choice either the theory of a legal right, power, privilege, or immunity bargained for and given in exchange for a promise, or any act or promise bargained for and given in exchange for a promise, or the will theory of consideration which would really be the theory of no consideration at all.

The theory of legal right, power, privilege or immunity (or the promise thereof) bargained for and given in exchange for a promise could never be adopted as the sole consideration in Anglo-American law, because in many cases it seems to require too much, and therefore to be out of harmony with the social interests of the day. It would require too much in the case of voidable contracts and conditional contracts, unless they are rationalized as has been hinted above. It would require too much in the cases where moral consideration has been held to be enough. It would also require too much in the cases where injurious reliance has been held to be enough. Of course, it requires too much in those cases where promises have been enforced without consideration. The decisions in all of these later cases have been required by what is regarded as the modern sense of justice. The theory in question, therefore, would be as liable to accomplish injustice as justice, and it could never be chosen as an exclusive theory.

Any act or promise bargained for and given in exchange for a promise would meet the same objections as have been made to the theory of a legal right, power, privilege, or immunity (or the promise thereof) bargained for and given in exchange for a promise, so far as concerns those cases where promises have been upheld for moral consideration or because of injurious reliance or without consideration. And it would not, according to some decisions, be adequate for two types of cases where at the present time a legal right, power, privilege or immunity bargained for and given for a promise are required by our law. These are the forbearance to sue cases and the pre-existing legal duty cases. So that, if this theory of consideration were adopted, it is contended these two exceptions would have to be

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134 Lorenzen, *Causa and Consideration*, 28 Yale L. Jour. 633.

included in it. If it were not for these exceptions the theory of detriment to the promisee in the sense of any act or promise bargained for and given in exchange for a promise would have many things to commend it. It would mean no further consideration than would be required by our modern law of agreement, with its requirement of offer and acceptance either by act or by promise. In a unilateral agreement, there would be detriment to the promisee in the sense of an act. In a bilateral agreement there would be detriment to the promisee in the sense of a promise. In other words, consideration would then be synonymous with agreement, and it would really be superfluous to talk about consideration, for whenever there would be a valid agreement there would be sufficient consideration. It would include all the cases of consideration except moral consideration and injurious reliance, provided no exception was made in favor of forbearance to sue cases and pre-existing legal duty cases.

The theory that no consideration should be required, but that all promises should be enforced "which a reasonable man in the position of the promisee would believe to have been made deliberately to assume a binding relation" is advocated strongly by Dean Pound. He contends that a "man's word in the course of business should be as good as his bond, and that his fellow-men must be able to rely on the one equally with the other if our economic order is to function efficiently."[135] There is no proof that any kind of consideration is intrinsically necessary for a contract. One common law contract, the covenant, never had such a requirement and was not objectionable for that reason. The Roman law as we have seen, practically took this position. Countries like Brazil, Germany, Japan, and Switzerland, which recently have adopted civil codes after thorough study have decided to make no requirement of consideration.[136] Hebrew law made no requirement of consideration for contracts.[137] Why should any kind of consideration be required? The common law has said so that a man should be paid something for his promise, but the common law has made this requirement a subterfuge. Lord Mansfield held that if there was a reason for a consideration it was for the sake of evidence.[138] As the bargain

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135 Pound, *An Introduction to the Philosophy of Law*, 276, 282.

136 Lorenzen, *Causa and Consideration*, 28 Yale L. Jour. 642.

137 41 Am. Law Rev. 717-8.

138 "I take it that the ancient notion about the want of consideration

theory was worked out in practice, it would seem that it is more important to make sure that men shall not be held on promises which they never made than that they receive such a consideration as is found under the bargain theory. Where a promise is in writing, the position that no consideration should be required seems to be justified philosophically; and it is supported by sufficient authority, because it is supported by the cases of contracts under seal and many cases of modern origin of promises in writing without the seal. But when we come to oral promises, it is more difficult to justify the dispensing with consideration, because if that was done both the requirement of bargain and the requirement of evidence would be violated. Social interest demands that social control be applied to oral promises. Hence, it would seem that the theory that no consideration should be required for the enforceability of promises, like the others which have been considered, cannot be adopted as a sole theory.

It appears, therefore, that there is no one theory of consideration which can be adopted for Anglo-American law. In Anglo-American law we have had many different theories of consideration, and apparently we must continue to have them. Any reform of our law will therefore have to adopt some definition of consideration which will combine a number of different theories.

Confronted with this situation, the writer is inclined to put contract promises into different classes and to prescribe a different kind of consideration for each one. (1) In class 1 he would put all promises in writing, and for these he would have no requirement of consideration at all. (2) In class 2 he would put those promises which have been upheld for what the courts call moral consideration, and would continue the law as it exists. (3) In class 3 he would put those promises which have been enforced because of injurious reliance upon them and would continue to enforce these promises as they have been historically enforced and perhaps would allow the law to grow in this field. (4) In the 4th class, he would put those promises in the form of agreement and in this class he would require the consideration of an act or a promise (other than refraining or promising to

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was for the sake of evidence only, for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration. And the Statute of Frauds proceeded on the same principle. In commercial cases among merchants the want of consideration is not an objection." *Pillans et al. v. Van Mierop et al.*, 3 Burr. 1663.

refrain from an illegal act) bargained for and given in exchange for a promise.

Promises in writing should be enforced without consideration whether under seal or not under seal, because the seal in modern times has become a form and technicality, if not a surplusage. The signature of a party is more important than a seal and should be substituted for it. Contracts under seal never needed consideration and by the same token a promise in writing without a seal should not need consideration. While the American Law Institute was not prepared to go to this length, the commissioners on uniform state laws have recommended this reform in one of its uniform acts.[139]

In the case of promises enforced for moral consideration and promises enforced because of injurious reliance, it should be noted that we have types of promises which do not fall within any other categories. Consideration is not the only anomaly in the case of these two types of promises. These promises are not in the form of agreement. Offer and acceptance are not required. The fact that the doctrine of moral consideration and injurious reliance have survived the bargain theory of consideration shows that there is a social interest for their continuance just as much as there is for the continuance of the contract under seal.

This leaves the bargain theory of consideration for only those contracts which are in the form of agreement, and the writer has tried to simplify consideration here by making consideration synonymous with offer and acceptance, as re-defined. This would make a slight change in the law and some people might not be willing to go so far as to allow this simple doctrine of consideration to obtain in all cases. The American Law Institute, however, has apparently thought it wise to go this far.[140]

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[139] *Uniform Written Obligation Act*, 76 U. of Pa. L. Rev. 580.

[140] The American Law Institute in its restatement of the law of contracts has adopted the bargain theory for consideration and has provided that any act or promise will be sufficient consideration under the bargain theory, except (1) Where there is "an act or forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promisor or to the public, or, if imposed by the law of torts or crimes, is owed to any person;" (2) Where there is "the surrender of, or forbearance to assert an invalid claim or defense by one who has not an honest and reasonable belief in its possible validity."

The writer believes this the best solution of the problem of consideration for contracts in the form of agreement. The consideration in forbearance to sue cases and pre-existing legal duty cases is really no different than the consideration in infant's contracts, other voidable contracts, and conditional contracts. In pre-existing legal duty cases between the same parties and in forbearance to sue cases there is no consideration where a person promises not to commit malicious prosecution or a breach of contract. Why? Not because the promisee does not give up or promise to give up a power, for he does; but because both a malicious prosecution and a breach of contract are legal wrongs, and though a person has the power to commit either one of these and thus impose legal liability upon himself, the refraining or the promising to refrain from exercising a power to do an illegal thing will not be allowed by the law to be sufficient consideration for a promise.[141] In other cases the giving up or the promise to give up of a legal power would be sufficient consideration. But this kind of consideration is just the kind of consideration which is found in infant's contracts, other voidable contracts, and conditional contracts. In all of these cases the promisor promises to give up a legal right, or privilege, or power, or immunity. If he did not promise to do this but only promised to give up a legal right, or a privilege, or a power, or an immunity, if he chose to do so, the promise would be illusory and like any other illusory promise. Illusory promises are no promises at all. They answer the requirements neither of agreement nor of the bargain theory of consideration. Hence, there is no other alternative but to hold that in these types of con-

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Where our law now requires the injurious reliance theory and moral consideration, the American Law Institute rationalizes the subject by providing that no consideration at all shall be required.

[141] It has been contended that in such cases the power to commit a malicious prosecution or the power to commit a breach of contract would be sufficient consideration, because the giving up or the promising to give up of any power would be sufficient consideration but that such a contract would be void for illegality. The trouble with this explanation is that the contract if based on sufficient consideration would not be illegal. While it would be illegal to make a contract to break a contract, or to maliciously prosecute another, or to murder another, or to commit any other legal wrong, a contract to refrain from committing a murder, or malicious prosecution, or breach of contract would be one whose object would be legal instead of illegal. Hence, this problem must be solved from the standpoint of consideration and not from the standpoint of illegality.

tracts the thing given or promised must be a legal right, or power, or privilege, or immunity, just the same as in forbearance to sue and pre-existing legal duty cases. In all of these types of cases the power of avoidance or disaffirmance is a separate matter and a power given by the law. It has nothing whatever to do with consideration or the making of a contract. It relates merely to performance. The same thing is true of promises on condition. The condition relates to performance rather than to the making of a contract. Since the consideration of any act or promise connotes an act or a promise which is a legal right, power, privilege, or immunity, there is only this thing which will amount to a sufficient consideration under the bargain theory, and because the statement of any act or promise has the advantage of simplicity and correspondence with offer and acceptance, it has been chosen without any exceptions (other than refraining or promising to refrain from an illegal act) rather than the statement of "a legal right, power, privilege, or immunity, or the promise thereof."[142]

It may seem to some that the writer has proposed the abolition of the requirement of consideration for contracts. Of course no consideration would be necessary for promises in writing; it may be that the name consideration should not be given to moral consideration and injurious reliance; and the only consideration necessary in contracts created by agreement is possibly that found in the law of agreement itself. Perhaps this would abolish consideration. If this would be the result, the writer still would advocate it. Consideration was not divinely ordered. All the

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142 The writer would have preferred to have stated consideration as the requirement that the act or promise in the law of agreement must be an act or a promise which includes, or involves, some legal right, power, privilege, or immunity other than the power to do an illegal act. However, since the American Law Institute (§ 75) prefers to state consideration in terms of agreement (i. e., act or promise) he has out of deference followed their statement. But it should be noted that after doing so he has stated the law of agreement (act or promise) so as to include all that would have been included if he had stated it in terms of consideration. This must be done for accuracy. The first two exceptions of the restatement of the American Law Institute (§ 76) he states in terms of illegality, both because this is the way to rationalize such exceptions and because the exceptions should be broad enough to include all cases of refraining and promising to refrain from illegality (for example, not to murder another, or not to commit a battery, or a conversion, or a trespass, etc.).

different forms of consideration are accidental. Their abolition would not wreck the legal work. Yet, the writer does not advocate the application of social control to all promises intended as a business transaction. This would involve the abolition of agreement (offer and acceptance) as well as consideration. Perhaps all men should have the right to rely upon such statements of others. If this should ever become social policy it might work well enough. But the law of agreement has proven satisfactory and is too thoroughly imbedded in our traditions to be given up unless social interest demands it. In the case of ordinary oral promises, not only is there no such demand, but, for the sake of evidence if not for bargain, social interest seems to require something more than a mere promise.